IN THE

Supreme Court of the United States

OCTOBER TERM, 1904

No. 227

NICHOLAS J. STEIGLEDER AND CHRISTINA STEIGLEDER, his wife,

Appellants,

vs.

KATHERINE AUGUSTE McQUESTEN,

Respondent.

REPLY BRIEF OF APPELLANTS.

If we read respondent's brief literally, upon the second page wherein it states, "1. In her Bill of Complaint the respondent *states* the diversity of citizenship in these words," etc., we must take it as an admission on respondent's part that she does not *allege* diversity of citizenship. It appears to us so plain that this statement in the Bill of Complaint is not an allegation but is a preamble or general statement before an allegation, that further comment is hardly necessary.

This being no allegation, there was no occasion for denying it. In fact, how could it have been denied? It is not alleged in paragraph 1 or any subsequent paragraph of the complaint thereafter, hence it was impossible to deny it; impossible to even deny or attempt it, for the reason that it was not alleged.

The case of Hartog vs. Memory, 116 U. S. 588, cited by respondent, is diametrically opposed to respondent's theory, as the court say on page 590, "It was well settled before the act of 1875, that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the ~~facts~~ face of the record, evidence to contradict the record was not admissable, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction." No such a plea is necessary at this time, and especially when there is no allegation in the Bill of Complaint showing diversity of citizenship. Counsel for respondent is apparently laboring under the delusion that it was necessary for appellants to allege and

prove diversity of citizenship. In this he certainly is in error and the rule and law is fundamental.

One short paragraph of the record, on page 20, to-wit, "Now, therefore, I do certify to the Supreme Court the sole question of the jurisdiction of this court in said cause, to-wit: did the court err in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction," answers the principal argument of respondent herein. Respondent, on page 3 of her brief, endeavors to draw a distinction between plaintiff's residence and her domicile or citizenship. We care not by what name it is called. We do insist that there is no allegation in the Bill of Complaint, nor is there any evidence in the record to show plaintiff was a resident of the State of Massachusetts, but on the contrary, we again state that it affirmatively appears in the record that she was a resident of Seattle, Washington; that she had no home, domicile or interests in Massachusetts, but that her home, domicile, all her real estate, all her interests and all of her money and family were in Seattle.

The closing sentence, in the opinion of the Honorable Circuit Court, on the motion to dismiss for want of jurisdiction, on page 13, of the record, shows that after the evidence was all introduced, and the motion was made to dismiss, the court then found no evidence that complainant was born in the United States. Thereafter testimony was introduced to bolster up this weakness, and if it had been possible for respondent to have strengthened her position as to her citizenship or domicile, she certainly would have done so again, especially with a counsel with such marked ability for ingenuity and splitting of hairs as is exhibited in the brief before us.

Respondent's counsel say on page 8 of their brief, that the fair inference is defendants waived the defect of jurisdiction, thus admitting there is a defect of jurisdiction, but justifying upon the theory that appellants waived it. We brush this entire argument aside by merely suggesting to this Honorable Court that jurisdiction is not waived by inference, and that this question has been disposed of as we stated in our opening brief, to-wit: "The presumption is that the cause is without its jurisdiction unless the contrary affirmatively appears:" Grace vs. American Central Life Insurance Co., 109 U. S. 278-283. Again it will be borne in mind that plaintiff never introduced evidence touching upon her domicile or citizenship until after this had been brought out by defendant's counsel.

Counsel again say on page 9 of their brief, that "no question of jurisdiction is presented by the record." Now if no question of jurisdiction is presented by the record, we are at a loss to know how one can be, and what is presented. If we understand the law correctly, when the Honorable Circuit Court certified the question of jurisdiction to this Honorable Court, as shown on page 20 of the record supra, that certification was all that the law requires, and the authorities cited by respondent on page 10 of *his* brief, fully sustains this position. In the case of Maynard v. Hecht, cited by respondent, 151 U. S. 324, Mr. Chief Justice Fuller, in his statement of the case, says, "No certificate of question for decision was applied for or granted by the court," and again, in the opinion, the court say, "We are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause." In The Bayonne, 159 U. S. 687, cited by respondent, a cursory reading of the last paragraph of the syllabus shows that that case is not applicable to the case at bar, to-wit, "The judge entered therein "appeal allowed." Held, that this was entirely insufficient to answer the purposes of a certificate of jurisdictional questions." And in the opinion, it cites Maynard vs. Hecht, supra. Again in Van Wagenen vs. Sewall, 160 U. S. 369, cited by respondents, Mr. Justice Brown, rendering the opinion of the court, says, "In such cases, however, "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision," there is an entire absence of such certificate in this case," and further on in said opinion, Mr. Justice Brown again says, "So, also, in Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, where the court below, granted the appeal, said, "this appeal is granted solely upon the question of jurisdiction" and made further provisions for determining what part of the record should be certified to this court under appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act."

Bearing in mind that this last quotation is from a case cited by respondent's counsel, and applying it to the case at bar, what do we find? On page 18 of the record, commences the certificate of the Honorable Circuit Judge; and on page 20, the sole question of jurisdiction is certified to this court; also "so much of the record as is necessary for the determination of the question o fjurisdiction," is also certified; and on page 35

it is ordered that an appeal be allowed as prayed for." We ill not impose upon this court by further commenting, except say that should the court find that there is any defect in rm, we respectfully ask leave to amend.

Respondent's counsel, on page 11, apparently forgot that page 20 of the record, the Honorable Circuit Judge certi- d that so much of the record as was necessary for determin- g the question of jurisdiction was sent to this court, and we re frank to admit that this is the first time we ever learned at this court could consider testimony not in the record, to y nothing of the astounding statement that the court should nsider it "prima facie correct"; especially when the court as certified as aforesaid; and we frankly submit that this court annot find that the court below was correct in its conclusions to the diversity of citizenship unless it goes outside of the cord as is requested by respondent's counsel, and this we ow this court will not do. There was no other testimony in is case showing respondent to be a resident of or having her micile in Massachusetts or any other place than Seattle, and there had have been, it was the duty of respondent's counsel see that such statement was in the record. No testimony of y kind, not even implication, can be found showing plaintiff tained one vestige of a domicile in Massachusetts.

It will be noticed that on page 7 of the record, that the fendants, saving to themselves all manner of benefit of ex- ption or otherwise, that can be or may be had or taken to the any errors, uncertainties and imperfections in said bill, did en answer unto plaintiff's complaint, thereby throwing about emselves all protection possible when they were forced to nswer thereunto. Again this is not the jurisdiction which can waived. How can defendants waive plaintiff's jurisdic- on; they might waive their own, but not plaintiff's.

We frankly submit that when the brief of respondent's unsel is read in the light of the record and in the light of the w, respondent has utterly failed to show that the lower court ad any jurisdiction of the complainant herein, and that appel- nts are entitled to a decision of this court in their favor.

Respectfully submitted,

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